BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

LONI GIETZEN-HERRMANN	)	
Claimant	)	
VS.	)	
	)	Docket No. 186,832
EXCEL CORPORATION	)	
Respondent	)	
Self-Insured	)	
AND	)	
	)	
KANSAS WORKERS COMPENSATION FUND	)	

ORDER

The application of respondent for review by the Workers Compensation Appeals Board of an Award entered by Administrative Law Judge Jon L. Frobish came on for oral argument in Wichita, Kansas.

APPEARANCES

Claimant appeared by and through her attorney, David H. Farris of Wichita, Kansas. The respondent and its insurance carrier appeared by and through their attorney, D. Shane Bangerter of Dodge City, Kansas. The Kansas Workers Compensation Fund appeared by and through its attorney, Jerry Moran of Hays, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The record and stipulations as specifically set forth in the Award of the Administrative Law Judge are herein adopted by the Appeals Board. In addition, the Appeals Board notes the stipulation between the respondent and the Kansas Workers Compensation Fund apportioning 30 percent of liability, in this matter, to the Workers Compensation Fund and 70 percent of liability, in this matter, to the respondent.

ISSUES

What is the nature and extent of claimant's injury or disability? The parties have stipulated to a 5 percent whole bodily functional impairment, in this matter, with the only issue being claimant's entitlement to work disability, if any.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record, including the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

Claimant suffered personal injury by accident beginning on September 5, 1991, and up through and including September 10, 1993. Claimant worked as a machine operator for Excel from July 20, 1988, to September 10, 1993. This job required claimant to pull bagged meat off of a belt and put it into a machine. At times she would have to pick up the meat and throw it into combos (large boxes), all of which requires substantial bending and lifting. On September 5, 1991, she was running a cryovac machine. When it broke down she had to start "comboing" or boxing products. While picking up a piece of meat, she felt a sharp pain in her lower back and immediately notified her foreman. Claimant's uncontradicted testimony is that she continued working and her back continued to worsen. Claimant was taken off work by Dr. Randy Schmidt, a chiropractor, on September 10, 1993, and was provided temporary total disability compensation. Dr. Schmidt released claimant on December 7, 1993, to return to work as long as claimant was not put back on the cryovac machine. When claimant returned to work she was put back on the cryovac machine. She performed the job for a couple of hours and then, when her back started hurting, she left. Dr. Schmidt, again, took claimant off work December 8, 1993. In 1994, claimant was treated by Dr. Eustaquio Abay and Dr. C. Reif Brown, who began treating claimant on September 21, 1994. Dr. Brown placed specific work restrictions upon claimant including extremely light work activity, that she be allowed to sit and stand alternately, to be allowed to walk certain distances periodically, and work a job which would not require repetitive bending or lifting in excess 10 pounds. Dr. Brown also prescribed work hardening five days a week, three hours per day, leading up to eight hours a day.

On October 10, 1994, claimant received a letter from Susan Stephens indicating that she was to return to work with accommodated employment offered within Dr. Brown's restrictions. Claimant had a telephone conversation with Ms. Stephens on October 12, 1994, at which time Ms. Stephens was advised by claimant that she was in physical therapy and could not come to work. Respondent then provided a subsequent letter dated October 14, 1994, advising claimant accommodated work was available within restrictions set by Dr. Brown. The medical records do not indicate whether claimant was in physical therapy subsequent to October 12, 1994.

Claimant argued the accommodated work offered by respondent was not within her restrictions. This argument is contradicted by respondent's evidence contained in the deposition of Susan Stephens. Ms. Stephens, the workers compensation coordinator for Excel in Dodge City, Kansas, testified that the September 29, 1994, letter to claimant

offered to return claimant to return to work within the restrictions placed upon claimant by Dr. Brown. Subsequent to a telephone conversation on October 12, 1994, claimant was again offered employment within the restrictions placed upon her by Dr. Brown. This letter offer of October 14, 1994, specified the accommodation was to be in the laundry room and would be within the restrictions placed upon claimant. Respondent also offered to accommodate the physical therapy sessions being attended by claimant. However, claimant properly objected to the geographics of the offer involving a job in Dodge City, Kansas, and physical therapy in Great Bend. This would constitute a substantial burden upon claimant if claimant continued to attend physical therapy. As noted above however, there is no indication claimant attended physical therapy or work hardening subsequent to October 12, 1994.

Respondent contends claimant should be entitled to a functional impairment only, having refused to accept accommodated work offered by respondent on two separate occasions. In support of its position, respondent cites Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995). Respondent argues that the logic of the Court's denial of work disability in Foulk should have been applied to this case because claimant refused accommodated employment within her restrictions. Claimant counters with the argument that respondent's accommodation was based upon temporary restrictions only and there was no indication that claimant would have a full-time job. Susan Stephens, in her deposition, testified that the restrictions placed upon claimant as of October 1994, were indeed temporary from Dr. Brown. However, Ms. Stephens went on to state that once permanent restrictions were received, claimant would be allowed to tour the plant, choose jobs which were within her restrictions and which she felt she would be capable of performing, and thus appropriate accommodations would be met subsequent to the receipt of permanent restrictions.

The Court of Appeals, in Foulk, discussed a claimant who, after suffering a low back injury, was offered an accommodating job by her employer. The claimant, in Foulk, turned the position down "because she felt she could not perform certain aspects of the job in light of the medical restrictions she was under." *Id*. at 280. The Court of Appeals in denying Foulk work disability stated:

> "The legislature clearly intended for a worker not to receive compensation where the worker was still capable of earning nearly the same wage. Further, it would be unreasonable for this court to conclude that the legislature intended to encourage workers to merely sit at home, refuse to work, and take advantage of the workers compensation system. To construe K.S.A. 1988 Supp. 44-510e(a) as claimant suggests would be to reward workers for their refusal to accept a position within their capabilities at a comparable wage." *Id*. at 284.

Respondent's contention that claimant should not be rewarded for refusing to work is found by the Appeals Board to be appropriate, in this matter. The award of the Administrative Law Judge, Jon L. Frobish, granting claimant a work disability is hereby

reversed. Claimant is awarded her functional impairment of 5 percent to the body as a whole as stipulated by the parties.

The additional issues decided by the Administrative Law Judge but not appealed to Workers Compensation Appeals Board are hereby affirmed in so far as they do not contradict the opinions expressed herein.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Jon L. Frobish dated March 7, 1996, should be, and is hereby, modified and claimant is granted an award against respondent, Excel Corporation, and the Kansas Workers Compensation Fund for an accidental injury sustained through September 10, 1993, for a 5 percent permanent partial general body disability.

Claimant is entitled to 63.29 weeks temporary total disability compensation at the rate of $269.98 per week totaling $17,087.03 followed thereafter by 18.34 weeks permanent partial disability at the rate of $269.98 per week totaling $4,951.43 for a total award of $22,038.46 which, at the time of this award, is all due and owing one lump sum minus amounts previously paid.

Pursuant to the stipulations of the parties the Kansas Workers Compensation Fund will be responsible for 30 percent of the cost and expenses associated with this award. The fees necessary to defray the expense of the administration of the Workers Compensation Act are hereby assessed as specified by the Administrative Law Judge in Docket No. 189,398.

IT IS SO ORDERED.

Dated this ____ day of April 1997.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: David H. Farris, Wichita, KS
D. Shane Bangerter, Dodge City, KS
Jerry Moran, Hays, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director